

# Notes

## Beyond *Mergens*: Ensuring Equality of Student Religious Speech Under the Equal Access Act

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Insofar as religion is concerned, we live in a peculiar society. On the one hand, although the Constitution guarantees freedom of religious practice and belief,<sup>1</sup> these protections do not extend beyond houses of worship for many who believe that religion belongs only in church. On the other hand, we are a "broadly religious" people immersed in a "rich and diverse fabric of beliefs."<sup>2</sup> Religious adherents, who often seek to express their faith in public settings,<sup>3</sup> thus meet resistance by those with differing conceptions of the permissible scope of religious activity in the public domain.

When such conflicts occur in the public secondary school, they generate the most intriguing and divisive questions concerning the proper role of religion in modern society.<sup>4</sup> The oft-debated question of student-initiated religious

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. Times, Apr. 10, 1991, at A1, col. 1 (comprehensive survey finds 90% of Americans identify themselves as religious).

3. "[S]ocial, economic, and political 'involvement' is not an optional 'extra' for many religions. It is an integral part of their religious vision and mission, as important as 'cult, code and creed' elements are to other faiths." Weber, *Response to Stephen V. Monsma*, in *EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT* 90 (P. Weber ed. 1990).

4. Recent years, for example, have witnessed protests by so-called religious "fundamentalists" over the advancement of the religion of "secular humanism" in school textbooks, and successful challenges to moments of silence designed to provide an opportunity for prayer. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring students to read textbooks offensive to parents' values does not unconstitutionally burden free exercise of religion), *cert. denied*, 484 U.S. 1066 (1988); *Wallace v.*

speech is no exception. The nation has recently focused its attention upon student religious groups, such as Bible study and prayer clubs, that seek to meet before or after class in school facilities. Students, parents, and school officials often differ concerning these voluntary gatherings for prayer or religious discussion: some feel they merit a place within the public school system, while others believe they belong only in church.<sup>5</sup>

In 1984, Congress passed an extraordinary piece of legislation, the Equal Access Act,<sup>6</sup> in order to protect voluntary forms of religious speech in the face of potentially hostile school officials.<sup>7</sup> The EAA works a sensible compromise between the interests of schools and students by promising student clubs nonpreferential access to facilities at schools that allow "noncurriculum related student groups to meet on school premises during noninstructional time."<sup>8</sup> If a school allows one or more of these "noncurriculum related"<sup>9</sup> groups to meet, it may not discriminate against other student groups on the basis of the religious or other content of their speech.<sup>10</sup>

Upon its passage, the constitutionality of the EAA was intensely debated;<sup>11</sup>

Jaffree, 472 U.S. 38, 40 (1985) (striking down Alabama statute authorizing "periods of silence . . . for meditation or voluntary prayer"); see also Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315-17 (1986) (briefly tracing "bewildering" line of Supreme Court decisions).

5. Strict separationists who advocate an impenetrable barrier between church and state often appeal to Thomas Jefferson's famous "wall of separation" language. See Healey, *Thomas Jefferson's "Wall": Absolute or Serpentine?*, in EQUAL SEPARATION, *supra* note 3, at 123. Interestingly enough, even Jefferson endorsed the establishment of voluntary religious schools on the campus of the public institution he founded, the University of Virginia. See Weber, *Response to James M. Dunn*, in EQUAL SEPARATION, *supra* note 3, at 64, 66-69. Today, most would agree that "[n]o perfect or absolute separation is really possible." Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

6. 20 U.S.C. §§ 4071-4074 (1988) [hereinafter "the EAA" or "the Act"]. For a general discussion of the Act, see *infra* notes 23-34 and accompanying text.

7. The Act is extraordinary, not only because it represents a rare congressional attempt to protect religious activity, but because it "has made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law." Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356, 2376 (1990) (Kennedy, J., concurring). In the opinion of Congress, comprehensive legislation establishing "a policy of fair, even-handed treatment" was necessary to counteract excessive restrictions on student religious speech. H. REP. NO. 710, 98th Cong., 2d Sess. 1 (1984) [hereinafter HOUSE REPORT]. As the Senate Committee on the Judiciary observed in reporting on its proposed equal access bill:

[M]any school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech. These districts have banned student-initiated extracurricular religious clubs, . . . student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property.

S. REP. NO. 357, 98th Cong., 2d Sess. 11-12 (1984) [hereinafter SENATE REPORT]. The Committee noted that "[g]enerally, those administrators act not from malevolence toward religion but from ignorance of the law[,] erroneous legal advice," and confusion stemming from contradictory court decisions. *Id.* at 6-7.

8. 20 U.S.C. § 4071(a) and (b). See *infra* note 23.

9. This Note employs the term "curriculum-related," except when quoting from judicial opinions, legislative materials, or other sources.

10. 20 U.S.C. § 4071.

11. Compare Crewdson, *The Equal Access Act of 1984: Congressional and Free Speech Limits of the Establishment Clause in Public High Schools*, 16 J.L. & EDUC. 167 (1987) (rejecting as meritless claims that EAA unconstitutionally advances religion) and Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986) (arguing that neither

more importantly, its viability was undermined by judicial interpretation. In passing the EAA, Congress failed to define "noncurriculum related student groups," despite the fact that such groups "trigger" the Act. In the absence of congressional guidance, courts subsequently have allowed school officials to determine when "noncurriculum related" groups exist and thus when the Act applies. The very same authorities Congress sought to restrain have therefore been granted the wherewithal to circumvent the requirements of the EAA.<sup>12</sup>

After a tortured history in the federal courts, the constitutionality of the EAA was recently upheld by the Supreme Court in *Board of Education of Westside Community Schools v. Mergens*.<sup>13</sup> The Court in *Mergens* recognized that the EAA was calculated to alter the "status quo" of "perceived widespread discrimination against religious speech in public schools,"<sup>14</sup> and that complete deference to school officials permits them to maintain the status quo by thwarting the Act.<sup>15</sup> Nevertheless, it crafted a definition of "noncurriculum related student groups" susceptible to the same manipulation by school officials.<sup>16</sup> By leaving room for continued evasive strategies, the Court may have failed to correct the disparity between the EAA's objectives and actual enforcement.

This Note addresses the response required of Congress if it wishes to guarantee the EAA's efficacy. It analyzes the reasoning of *Mergens* and argues that reference to the curriculum in determining when the EAA applies is counterproductive, for the authority traditionally (and properly) granted to school authorities facilitates the Act's manipulation. The Note also argues that reference to the curriculum is unnecessary because (1) Congress actually intended to reach schools that allow student-initiated or -directed groups to meet, irrespective of courses offered in the curriculum; and (2) the proper question is whether student extracurricular activity is voluntary, for schools send an unconstitutional message of hostility toward religion whenever they discriminate among student-initiated or -directed groups on the basis of religion. Part I describes the context in which Congress debated the equal access issue. Part II examines one judicial interpretation of the EAA's triggering mechanism and derives the principal lesson that unbridled discretion on the part of schools to control religious speech hampers enforcement of the EAA. Part III discusses the recent *Mergens* opinion and its failure to preclude school authorities from effectively disregarding the Act. In conclusion, Part IV traces this failure to the

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impressionability of students nor need for supervision of meetings renders EAA unconstitutional) with Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174 (1986) (First Amendment does not require similar treatment of political and religious speech in public schools).

12. See *infra* notes 35-44 and accompanying text.

13. 110 S. Ct. 2356 (1990). See *infra* notes 48-64 and accompanying text.

14. *Mergens*, 110 S. Ct. at 2366.

15. *Id.* at 2369.

16. See *infra* notes 65-72 and accompanying text.

language of the Act itself and argues for an amendment that would more faithfully capture congressional intent and reflect constitutional concerns.

## I. THE ADVENT OF THE EQUAL ACCESS DEBATE

Before the passage of the EAA, equal access claimants at the college level succeeded in the federal courts. Yet similar claims by high school students fell upon deaf ears. This inconsistent judicial treatment, combined with public opinion, persuaded Congress to intervene on their behalf.

### A. *Equal Access and the Federal Courts*

Well before equal access became a congressional concern, the federal courts wrestled with the claims of students wishing to engage in religious speech in extracurricular fora. Prior to *Mergens*, the centerpiece of judicial scrutiny had been *Widmar v. Vincent*,<sup>17</sup> in which a group of evangelical Christian students won access to facilities at the University of Missouri. Primarily because the university had opened its doors to a wide variety of student groups, the Supreme Court struck down a school policy prohibiting access by religious organizations.<sup>18</sup> In mandating similar treatment for similarly-situated groups, notwithstanding content or purpose, *Widmar* introduced the term "equal access" and ushered in a new round of debate regarding the proper relationship between the state and religious groups.

In decisions before and after *Widmar*, however, the lower federal courts were generally unsympathetic to equal access claimants at the secondary level.<sup>19</sup> Before enactment of the EAA, the Courts of Appeals for the Second<sup>20</sup>, Third,<sup>21</sup> and Fifth<sup>22</sup> Circuit refused to allow student-initiated religious

17. 454 U.S. 263 (1981).

18. The Court determined that an equal access policy would satisfy the three-pronged establishment clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted): "First, the [policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" The Court reasoned that any benefits to the religious group would be "merely 'incidental.'" *Widmar*, 454 U.S. at 273-74 (quoting *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 771 (1973)). Because allowing religious speech in such an "open forum" would confer no "imprimatur of state approval," granting access would not have the primary effect of advancing religion. *Id.* at 274.

19. *Widmar* did not reach the question of religious speech in secondary schools. In his majority opinion, Justice Powell raised doubts about the applicability of equal access in secondary schools by distinguishing college students as "less impressionable than younger students" and consequently better "able to appreciate that [an equal access] policy is one of neutrality toward religion." *Widmar*, 454 U.S. at 274 n.14.

20. *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980) (student-initiated communal prayer meetings on school premises violated establishment clause, partly due to "improper appearance of official support"), *cert. denied*, 454 U.S. 1123 (1981). The Court denied certiorari in *Brandon* less than a week after it announced its decision in *Widmar*, quite possibly because of the distinction Justice Powell made between college and high school students. *See supra* note 19.

21. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984) (despite presence of limited public forum and similarity to facts of *Widmar*, establishment clause concerns precluded access by religious group), *rev'd on other grounds*, 475 U.S. 534 (1986). The Third Circuit focused on the potential danger

speech in public high schools.

### B. *The Equal Access Act*

Judicial treatment of equal access produced more confusion than guidance for students and school officials. Enter Congress, which passed the Equal Access Act<sup>23</sup> with broad, bipartisan support.<sup>24</sup> The EAA applies the rule of *Widmar* to public secondary schools that offer a "limited open forum," which arises whenever a school "grants an offering to or opportunity for one or more *noncurriculum related student groups* to meet on school premises during

that impressionable high school students would perceive official sanctioning of religious activity. *Id.* at 551-55. On appeal, the Supreme Court declined to rule on the merits and vacated the judgment on standing grounds. *Bender*, 475 U.S. at 549. Writing for four dissenting Justices who would have ruled to allow the group to meet, Justice Powell again played a key role by stating, "I do not believe . . . that the few years difference in age between high school and college students justifies departing from *Widmar*." *Id.* at 556 (Powell, J., dissenting). Nevertheless, the Court's decision reinstated the district court's ruling that discriminating among voluntary groups on the basis of religion infringes upon free speech rights. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983).

22. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1041 (5th Cir. 1982) (school board policy authorizing voluntary groups to "meet for any educational, moral, religious or ethical purposes" violated all three prongs of *Lemon* test); *see also* *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) (enjoining voluntary religious meetings on school premises).

23. 20 U.S.C. §§ 4071-4074 (1988). The Act reads in relevant part:

Sec. 4071. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

Sec. 4072. As used in this subchapter—

...

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

24. Considering the sensitivity of the topic, several legislators on both sides predictably expressed immoderate positions. *See, e.g.*, 130 CONG. REC. H7724 (daily ed. July 25, 1984) (statement of Rep. Schumer) (equal access would mean curriculum of "reading, 'riting, 'rithmetic and religion"); 130 CONG. REC. H3861 (daily ed. May 15, 1984) (Rep. Ackerman) (evoking images of animal sacrifices in classrooms and Charles Manson preaching to 12-year-olds); *id.* at H3871 (Rep. Stenholm) (expressing surprise at opposition to bill because Congress would raise "outraged cry" if schools prohibited "the Young Socialist Club or the Gay Youth of America or Teenagers for Planned Parenthood"). Still, after considerable compromise, *see infra* note 56, the EAA passed easily. 130 CONG. REC. H7740-41 (daily ed. July 25, 1984) (House vote of 337-77); 130 CONG. REC. S8370 (daily ed. June 27, 1984) (Senate vote of 88-11).

noninstructional time.”<sup>25</sup> A school that allows “noncurriculum related student groups” to meet may not lawfully discriminate against voluntary, nondisruptive groups “on the basis of the religious, political, philosophical, or other content” of their speech.<sup>26</sup>

Congress was motivated by the conviction that the mixed signals sent by the Supreme Court (*Widmar*), the courts of appeals (*Brandon, Bender*), and lower federal courts<sup>27</sup> had confused school administrators.<sup>28</sup> This confusion, Congress thought, led to overly cautious school board decisions at the expense of voluntary religious speech, as officials would ban religious organizations for the sake of principle<sup>29</sup> or expediency.<sup>30</sup> In passing the EAA, Congress essentially acted on its own vision of First Amendment free speech and religious exercise rights;<sup>31</sup> it also made specific findings concerning the maturity of stu-

25. 20 U.S.C. § 4071(b) (emphasis added).

26. 20 U.S.C. § 4071(a).

27. Before deliberation of the equal access issue, at least two district courts had allowed voluntary religious meetings in public schools. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Bell v. Little Axe Indep. School Dist.*, No. CIV-81-620-T (W.D. Okla. 1983) (allowing religious meetings involving elementary and junior high school students), *rev'd*, 766 F.2d 1391 (10th Cir. 1985).

28. See, e.g., 130 CONG. REC. S8361 (daily ed. June 27, 1984) (statement of Sen. Jepsen) (“Because of several differing lower court cases and the Supreme Court case, *Widmar* against Vincent, school administrators, and officials are confused and troubled about the equal access issue.”).

29. *Id.* at S8331 (statement of Sen. Hatch) (“School authorities often feel they are compelled by judicial interpretation of the first amendment to ban any religious activities . . .”).

30. Congress recognized that threats of legal action prevented many school officials from permitting voluntary religious activity. See, e.g., *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 24 (1983) [hereinafter *House Hearings I*] (statement of Rep. Bartlett) (discussing chilling effect of lawsuits); 130 CONG. REC. S8341 (daily ed. June 27, 1984) (Sen. Leahy) (some “decisions excluding religious clubs have come less from a conscious desire to stifle religion than from a general fear of taking chances in a complex area of the law.”).

Not all administrators, however, are motivated by principle or fear of legal challenges. After voting to continue seemingly unconstitutional practices that included faculty sponsorship of religious meetings, one member of a school board in Oklahoma exclaimed, “bring on the ACLU.” *Bell*, 766 F.2d at 1397.

31. Opponents and critics charged that the EAA amounted to “an attempt to overturn a decision of the Supreme Court by simple legislation.” *Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 125 (1984) [hereinafter *House Hearings II*] (statement of Norman Redlich, Dean, N.Y.U. School of Law). In past decisions, the Court has displayed a special sensitivity to the interplay of state and religion in public schools. See, e.g., *Stone v. Graham*, 449 U.S. 38 (1980) (statute requiring posting of Ten Commandments in classrooms unconstitutional); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (state-prescribed Bible readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily classroom prayers unconstitutional). Yet, in one form or another, these and other cases implicated the state as “speaker.” See Comment, *Beyond Neutrality: Equal Access and the Meaning of Religious Freedom*, 12 U. ARK. LITTLE ROCK L.J. 335, 368 (1989-90) (noting state initiation of and involvement in activities previously held unconstitutional). The Court has never disallowed truly voluntary and student-initiated religious speech in public schools. The EAA, as a congressional exercise of independent constitutional judgment, is more properly characterized as legislating at the constitutional “margins”:

[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits . . . . Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.

...

Perceived through this lens, section 5 of the fourteenth amendment can be understood to give Congress the authority to enact legislation which fills in that body's conception of the equal

dents and the message sent by the proscription of religious speech.<sup>32</sup>

The EAA represents a reasonable accommodation of the interests of students seeking to discuss their beliefs and officials seeking to avoid the perception of religious endorsement. Where other students pursue common interests voluntarily, the appearance of state support is much less likely.<sup>33</sup> Despite seeking the proper objectives, however, Congress fell short in its execution by failing to define the term "noncurriculum related student groups."<sup>34</sup> Thus the Act begs crucial questions: when is a group "noncurriculum related" and who is entitled to make this determination? This oversight presented considerable obstacles to equal access when courts entrusted school officials with the term's definition.

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protection clause. Congress can legislate against a broader swath of state practices than the Court has found or would find to violate the norm of equal protection, because the federal judiciary's enforcement of that norm fails to exhaust its scope.

Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21, 1239 (1978) (discussing *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding congressional invalidation of state literacy voting tests previously held constitutional by Supreme Court)).

Congress enacted the EAA pursuant to its Article I spending power rather than its powers under section 5 of the Fourteenth Amendment. Its decisions were substantively guided, however, by its own understanding of equal protection and of the First Amendment. Sager's analysis of the value of independent congressional judgment in the equal protection context is equally applicable to other constitutional provisions. See Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 323-26 (1982) (Congress' limited power to inform notion of equal protection extends to, *inter alia*, First Amendment freedoms). In light of this reasoning and the Court's abstention concerning equal access, Congress' course of action is defensible. Cf. 130 CONG. REC. H7668 (daily ed. July 24, 1984) (statement of Rep. Goodling) ("All we are saying is that since the Supreme Court has not acted at this point, since there is controversy in the lower courts, there should be some guidelines . . .").

For further discussion of nonjudicial constitutional judgment, see generally G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *CONSTITUTIONAL LAW* 44-47, 238-245 (1986).

32.

[T]he Committee [on the Judiciary], through the exercise of its fact-finding powers, believes that denial of student-initiated, extracurricular, religious speech, in cases where other extracurricular student speech is permitted, rests on two false assumptions. The first false assumption is that students who are below the college level are not able to distinguish between State-initiated, school-sponsored, or teacher-led, religious speech, and student-initiated, student-led, religious speech allowed as one of a variety of extracurricular student activities. The second false assumption is that students will *not* perceive a ban on all extracurricular religious speech as State hostility toward religion.

SENATE REPORT, *supra* note 7, at 9-10 (emphasis in original). Accord HOUSE REPORT, *supra* note 7, at 5-6; see also Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499 (1983) (discussing scientific findings of sufficient maturity to distinguish between state endorsement and toleration of religious speech).

33. In fact, discriminating among voluntary groups on the basis of religion actually conveys a constitutionally impermissible message of animosity. See *infra* notes 95-102 and accompanying text.

34. Congress also failed to realize that a curriculum-relatedness test is inherently malleable because there is "no widely accepted definition" of the term "curriculum." Connelly & Lantz, *Curriculum, Definitions of*, in THE INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 1160, 1160 (T. Husen & T. N. Postlethwaite eds. 1985) (definition of curriculum "varies with the concepts that a researcher or practitioner uses in his or her curricular thinking and work"). Thus the current test enables school officials to define "noncurriculum related" groups to suit their purposes. See *infra* notes 35-44 and accompanying text.

## II. JUDICIAL REVIEW OF SCHOOL BOARD DECISIONS UNDER THE EAA

The full implications of this lack of congressional guidance came to light through judicial interpretation of the EAA. As one equal access case arising in the state of Washington illustrated, allowing school officials to determine when the Act applies may result in decisions that breach the spirit of the EAA.

### A. *The Meaning of "Noncurriculum Related"*

In *Garnett v. Renton School District No. 403*,<sup>35</sup> the court attempted to supply meaningful content to the term "noncurriculum related." In 1984, a group of students at a high school in Renton, Washington sought permission to meet in an empty classroom before the beginning of the school day in order to read the Bible, discuss peer issues, and pray. When the principal denied repeated requests, the students brought suit, claiming violations, among other things, of their right of equal access under the EAA.<sup>36</sup>

When the suit was first filed, students at the school were involved in a number of voluntary clubs not directly related to the curriculum.<sup>37</sup> Encouraged by the broad assortment of peripheral groups, the plaintiffs contended that a "limited open forum" existed. The school board, however, argued that existing groups represented "nonacademic components of the curriculum" and that each was related to a specific course offering.<sup>38</sup>

The district court agreed with the school board. It acknowledged that some ties between existing groups and the curriculum are more tenuous than others,<sup>39</sup> but decided that the question of relatedness is best left exclusively to local school boards. According to the court, the curriculum "consists of all those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors . . . . [T]he curriculum is what the local school board says it is."<sup>40</sup>

35. 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989).

36. 675 F. Supp. at 1269.

37. These included the Bowling Club, the Ski Club, the International Club, the Minority Student Union Club, the Chess Club, and the Girl's Club, among others. See Appellees' Brief at 20 n.16, *Garnett*, 874 F.2d 608 [hereinafter Appellees' Brief]; Brief for Appellants at 5, *id.* [hereinafter Appellants' Brief].

38. Appellees' Brief, *supra* note 37, at 5. Among the curriculum ties claimed were these: the Minority Student Union was "directly related" to social studies classes; the Chess Club was "related" to the mathematics program; the Ski and Bowling Clubs were "related" and "directly related," respectively, to physical education classes; and the Girl's Club was "directly related" to "Home and Family courses." *Id.* at 20 n.16.

39.

[T]he degree to which a variety of possible student groups may be related to the curriculum varies along a continuum; thus, for example, a math club would be directly related to the body of mathematics courses within a curriculum, while a chess club would be more tenuously related to the mathematics curriculum.

*Garnett*, 675 F. Supp. at 1273.

40. *Id.* at 1271 (emphasis added).



### B. *The Implications of Local Discretion*

This interpretation of the EAA is troubling. Complete deference to a school's determination of curriculum-relatedness allows frustration of the EAA by permitting schools to decree that all existing groups save religious organizations are curriculum-related.<sup>41</sup> If school officials enjoy complete license to declare what is curriculum-related, they may eviscerate the Act by unilaterally classifying, by mere assertion, all campus activities as curriculum-related. One struggles to comprehend why a service, but not a religious, club is "related" to psychology or social studies classes.<sup>42</sup> Yet the import of *Garnett* is that a school is not required to articulate principled reasons: it need only state that a service club *is* related and that a religious group is not.<sup>43</sup>

On appeal, the Ninth Circuit left the lower court's rulings undisturbed.<sup>44</sup>

### III. *MERGENS*: DEFINING "NONCURRICULUM RELATED STUDENT GROUPS"

Despite the failure of *Garnett* to guarantee principled decisions by school boards, student plaintiffs continued to rely on the EAA. Their efforts culminated in the *Mergens* decision, as both the Supreme Court and the Eighth Circuit acknowledged the difficulties introduced by unchecked school board decisions.

41. It was this fear that motivated Congress to change the EAA's test from "nonschool sponsored" to "noncurriculum related." See *infra* note 56; cf. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

See generally 130 CONG. REC. H12270-72 (daily ed. Oct. 11, 1984) ("Equal Access Guidelines"). Though not officially a part of the legislative history, these Guidelines are "especially important because there is no congressional report for the final version of the legislation." *Id.* at H12270 (statement of Rep. Bonker). Because lobbyists on both sides formulated the Guidelines, their interpretation of legislative intent is presumably reliable. Despite the ruling in *Garnett* that service clubs do not invoke the Act, the Guidelines specifically state that such clubs are not curriculum-related. *Id.* at H12271. The Guidelines also state that "a school cannot defeat the intent of The Equal Access Act by some all-encompassing definition that arbitrarily results in all but one or a few student clubs being defined as curriculum related." *Id.*

42. "[T]he same extended chain of reasoning could be used to justify religion as a promoter of [curricular goals]." *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 549 n.18 (3d Cir. 1984).

43. This dynamic introduces the type of circular reasoning that troubled the plaintiffs in *Garnett*: school officials "permit a student activity to meet if it is curriculum related, and an activity is curriculum related if they permit it to meet." Appellants' Brief, *supra* note 37, at 24 n.13.

In concluding that religious speech should enjoy parity, Congress expressed substantial concern over the disparate treatment afforded religious and other groups. But it is not enough to say that "likes should be treated alike." Without specifying the relevant aspects by which two distinct entities are similarly situated, the notion of equality is meaningless. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542-48 (1982). In failing to define "noncurriculum related," Congress failed to provide courts with the relevant criteria by which religious groups are similar to existing groups, and, ironically, rendered the Act "empty" from an equal protection perspective.

44. *Garnett v. Renton School Dist. No. 403*, 874 F.2d 608 (9th Cir. 1989). Acknowledging that "complete deference [to school districts] would render the Act meaningless," the court's independent examination nonetheless determined that previous extracurricular activities were "closely related" to the curriculum. *Id.* at 614. The court also decided, among other things, that the students had no countervailing free speech rights because the school district had not created a limited public forum. *Id.* at 610-13. The court arrived at this conclusion by noting that all existing groups had received board approval, a theory informed by the same circular reasoning described above.

### A. *The Lower Court Decision*

Under circumstances similar to those in *Garnett*, Bridget Mergens, a student at Westside High School in Omaha, Nebraska, asked her principal in January 1985 for permission to form a Christian Bible Study Club. Although no proposed club had ever been denied permission to meet, the principal refused to grant the Bible Study Club access to school facilities. At trial, the school board acknowledged that for many existing clubs attendance was voluntary and academic credit was not awarded. The board nevertheless successfully persuaded the district court that each club was curriculum-related.

The Eighth Circuit reversed.<sup>45</sup> Noting some of the slender curricular ties claimed by school board officials,<sup>46</sup> the court refused to leave such decisions exclusively to the school board.<sup>47</sup>

Thus, prior to the Supreme Court's decision in *Mergens*, courts either left the key question of curriculum-relatedness to the local school board or circumscribed board discretion by taking the question into their own hands. As we will see, the second approach also suffers, albeit inadvertently, from a susceptibility to arbitrary decisions under the current curriculum-relatedness test.

### B. *Defining Curriculum-Relatedness*

In an 8-1 decision, the Supreme Court upheld the right of Bridget Mergens' Christian club to meet on the same terms and conditions as existing student clubs.<sup>48</sup> The Court rested its holding on the view that the Act mandated official recognition of the club and did not run afoul of the establishment clause.<sup>49</sup>

45. *Mergens v. Board of Educ. of Westside Community Schools*, 867 F.2d 1076 (8th Cir. 1989).

46. The school principal testified that the chess club was related to logic, even though the high school offered no course in logic. He also testified that "Zonta" and "Interact," service clubs peripherally connected to Rotary International, were related to sociology and psychology, and that a group called the "Subsurfers" was related to physical education. *Id.* at 1078; cf. *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431 (3d Cir. 1985), *on remand*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986) (student-initiated volleyball is not curriculum-related); *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984) (Key Club, Chess Club, Aviation Club and others are not curriculum-related, having "at best only tangential relation to . . . course of study.").

47.

Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA.

*Id.* The court looked to the legislative history of the EAA for guidance. *But see infra* notes 54-59 and accompanying text for a discussion of the ambiguities of the legislative history.

48. *Board of Educ. of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990).

49. U.S. CONST. amend. I. Because the EAA provided a statutory basis for access to school facilities, the Court did not reach the plaintiffs' claims that the free exercise and free speech clauses of the First Amendment affirmatively mandated such access. *Mergens*, 110 S. Ct. at 2370. Nor does this Note decide whether access for voluntary religious speech in public schools is required by constitutional guarantees of free exercise or speech. Rather, it argues that denial of access for voluntary religious speech where other

In her majority opinion,<sup>50</sup> Justice O'Connor begins by noting that interpretation of the "crucial phrase . . . 'noncurriculum related student group'" must be "anchored in the notion that such student groups are those that are not

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voluntary speech is allowed violates the First Amendment's establishment clause by sending a message of hostility or disapproval of religion. *See infra* notes 95-102 and accompanying text.

In the wake of *Mergens*, an earlier Supreme Court decision appears to support free speech protections for voluntary religious speech in public schools. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld the exercise of reasonable restrictions on the speech contained in a school newspaper on the grounds that the newspaper's production was a "part of the educational curriculum and a 'regular classroom activit[y].'" *Id.* at 268. A careful reading of Justice White's opinion shows that he placed special emphasis on the school's role as promoter and publisher of the newspaper's content. Expressive "activities may fairly be characterized as part of the school curriculum," and thus subject to greater control by school authorities, "so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271 (footnote omitted).

The extracurricular activities protected by the EAA are neither supervised by faculty members in the same manner as the school newspaper in *Hazelwood* nor designed by the school. In protecting official control over "student speech that is disseminated under [a school's] auspices," *id.* at 272, the Court in *Hazelwood* continuously referred to official participation in the production process. *Hazelwood* appears to stand for the simple proposition that a school may exercise control over speech that it initiates or actively facilitates. Speech under the EAA, on the other hand, is *student-initiated*. *See Mergens*, 110 S. Ct. at 2372 (plurality opinion) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphases in original). The Court in *Hazelwood* explicitly recognized this distinction between school- and student-initiated speech by declining to decide whether "school officials may censor publications not sponsored by the school that students seek to distribute on school grounds." *Id.* at 273 n.6. *See, e.g., Burch v. Barker*, 861 F.2d 1149, 1157-59 (9th Cir. 1988) (*Hazelwood* does not apply to underground paper; corollary of *Hazelwood* rule of administrative control over what is taught "is that no similar content control is justified for communication among students which is not part of the educational program").

Similarly, the Court distinguished student speech that schools must tolerate—such as the familiar political protest in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (upholding right of students to wear black armbands in protest of Vietnam War)—from speech that it may control, specifically "expressive activities that . . . [others] might reasonably perceive to bear the imprimatur of the school." *Id.* at 569. Because the decision in *Mergens* was premised in part on the fact that others could not reasonably perceive school endorsement of the religious club, *see infra* note 97, voluntary religious speech would appear to fall under the first, protected category of student speech. *Cf. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion) (denying right to remove controversial books because "absolute discretion in matters of curriculum" does not extend to school library) ("curriculum" emphasized in original).

An authoritative determination that the free speech clause protects voluntary religious speech in public schools, however, would mandate access for religious groups even in fora that are void of other student-initiated groups. Such a decision is unlikely and perhaps undesirable. If Congress had taken this position, it would have produced an "Unconditional Access Act." Not only would this have been politically impracticable, *see* 130 CONG. REC. S8344 (daily ed. June 27, 1984) (statement of Sen. Hatfield), it would have required unconditional access for all other forms of voluntary speech to avoid the unconstitutional privileging of religious speech. Schools may have valid reasons for prohibiting all student-initiated speech: in the face of limited resources, for example, they may decide that allowing no student-initiated groups is preferable to allowing only certain ones. Thus it appears that Congress wisely refrained from further encroachments on local authority by requiring access only when a school has previously permitted students to organize voluntarily. *See infra* notes 74-86 and accompanying text.

50. Justice O'Connor spoke for a majority of the Court with respect to all issues except for the reasons why the EAA did not encroach upon the establishment clause. Although no Justice determined the Act to be unconstitutional, no constitutional theory commanded a majority of the eight Justices who reached the question. Because he did not believe the EAA applied to the extracurricular forum at Westside, Justice Stevens found it unnecessary to pass on the Act's constitutionality. *Mergens*, 110 S. Ct. at 2390 (Stevens, J., dissenting). *See infra* notes 67-71 and accompanying text.

related to the body of courses offered by the school."<sup>51</sup> As to the "difficult question" of the requisite *degree* of "unrelatedness", she points to the language of § 4072(3), which defines "meeting" as including those "'activities of student groups which are . . . not *directly related* to the school curriculum.'"<sup>52</sup> A curriculum-related student group must therefore have "more than just a tangential or attenuated relationship to courses offered by the school."<sup>53</sup>

At this point, Justice O'Connor admits that the phrase "noncurriculum related" remains "sufficiently ambiguous," to the extent that the Court would "normally resort to legislative history."<sup>54</sup> Her reasoning leads the Court to the central weakness of the EAA: the paucity of legislative history concerning the meaning of this phrase. After the bill which evolved into the EAA was reported out of committee in the Senate, it was "completely rewritten in a series of multilateral negotiations."<sup>55</sup> Because the compromise language (which included the term "noncurriculum related") was hastily adopted, the committee reports do not treat this language in the EAA.<sup>56</sup>

51. *Id.* at 2365. The Court, aware that "curriculum" could be defined more broadly to include nonacademic activities, resorted to the "common meaning" of the term found in dictionary definitions.

52. *Id.* (emphasis in original). See *supra* note 23.

53. *Mergens*, 110 S. Ct. at 2365.

54. *Id.*

55. Laycock, *supra* note 11, at 37.

56. *Id.* The Senate compromise language made its way to the House floor under a procedure that allowed neither hearings nor amendments. Among the very few references in the legislative history to the "noncurriculum related" language are the following two passages, a comparison of which illustrates the confusion engendered by the EAA's history:

1. In explaining the change in the Act's test from "nonschool sponsored" to "noncurriculum related," Senator Leahy stated:

But what motivated Senator Hatfield . . . and myself to work on yet another version of this bill about a week ago were some lingering doubts about the specificity of one or two key concepts.

One of those was the concept of the limited open forum—the very heart of the bill. It might have been possible under earlier versions of the bill to argue that a limited open forum resulted when a school made a formal decision to have a limited open forum, for example, by resolution of the school board. Or perhaps the decision might be not to have a limited open forum. *Whatever the official decision of the school, the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words.* Take the case of a school that decided not to have a limited open forum, having adopted a formal resolution to that effect. . . .

Counsel to that school board might well argue that the school board's resolution took the school outside the coverage of this bill . . . [T]he school could then turn around and allow only non-religious clubs or perhaps allow only religious clubs . . . .

*The point is that a limited open forum should be triggered by what a school does, not by what it says.*

130 CONG. REC. S8341 (daily ed. June 27, 1984) (emphasis added); cf. *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1372-77 (3d Cir. 1990) (despite school's statement of intent, actual practice of allowing "many diverse groups" created open forum).

2. A last-minute colloquy between Senators Gorton and Hatfield concerning the meaning of "limited open forum" proceeded as follows:

MR. GORTON. Let me ask the Senator this question: What about the high school football team? Is it a non-curriculum-related student group?

MR. HATFIELD. It is curriculum-related because that is how they can use tax dollars. The coaches are hired by the school administration. It is the department of physical education in which they teach health classes, courses within the curriculum. The athletic teams are curriculum-related. That is how we govern them in terms of antidiscrimination legislation as well because they are

Justice O'Connor quite correctly points out, however, that although the legislative history is not germane to the *language* actually adopted, it may nevertheless elucidate a "broad legislative purpose."<sup>57</sup> Justice O'Connor believes this broad purpose is reflected in the fact that "the Act was intended to address perceived widespread discrimination against religious speech in public schools."<sup>58</sup> Eight Justices agreed that this purpose dictates a broad construction of the term "noncurriculum" and a "low threshold for triggering the Act's requirements."<sup>59</sup>

Justice O'Connor emphasizes this purpose in arriving at the Court's definition of a "noncurriculum related" group, the heart of the *Mergens* opinion:

In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. *In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.*<sup>60</sup>

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part of that body.

MR. GORTON. *Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?*

MR. HATFIELD. *We in no way seek to limit that discretion.*

*Id.* at S8342 (emphasis added).

These two statements by Senators Hatfield and Leahy, the authors of the "noncurriculum related" language, are irreconcilable. One claims that formal line-drawing between curriculum- and noncurriculum-related activities may not differ from a school's actual practice; the other stresses that schools retain complete discretion to draw this line. Colleagues were undoubtedly correct in observing that not even the sponsors of the Act knew what the language meant. *Id.* at S8346 (statement of Sen. Metzenbaum); 130 CONG. REC. H7736 (daily ed. July 25, 1984) (statement of Rep. Fish); *see also* Laycock, *supra* note 11, at 38-39 (discussing irrelevance of Sen. Hatfield's comments).

Senator Hatfield's statement that "at least 1,000 people" were involved in drafting the EAA, "from the ACLU to the NEA to the religious groups," prompted Senator Gorton to respond that the process was a "magnificent example of too many cooks spoiling the broth." 130 CONG. REC. S8345 (daily ed. June 27, 1984). Unfortunately, the eleventh-hour contribution of Senators Hatfield and Leahy could not save the stew. Nevertheless, this much is clear: because it was concerned with "widespread discrimination," 110 S. Ct. at 2366, it is doubtful that Congress meant to defer uncritically to school officials. *Cf.* 130 CONG. REC. S8345 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum) ("If this would not change the authority of the school board, then I do not read English very well . . ."). Furthermore, there is no evidence that Congress considered curriculum-relatedness more relevant than other possible inquiries. Senators Hatfield and Leahy introduced the "noncurriculum related" language merely because they considered it a more objective test.

57. *Mergens*, 110 S. Ct. at 2366.

58. *Id.* (citations omitted); *cf.* Laycock, *supra* note 11, at 39 (footnotes omitted):

[T]he committee reports and debate do reflect agreement on a broad legislative purpose. The committees believed that there was widespread discrimination against student religious speech. The lopsided majorities that voted for the Act plainly wanted to end that discrimination . . .

[A]ny interpretation that largely validates the status quo is not faithful to the legislative purpose.

59. *Mergens*, 110 S. Ct. at 2366; *see also id.* at 2377 (Kennedy, J., concurring); *id.* at 2378 (Marshall, J., concurring).

60. *Id.* at 2366 (first emphasis in original; second emphasis supplied).

Thus, a French club is directly related to the curriculum if the school regularly teaches French; the band or orchestra is directly related to the curriculum if participation is required or academic credit is awarded; and student government is directly related to the curriculum because its business relates to the "body of courses offered by the school."<sup>61</sup> However, "a chess club, a stamp collecting club, or a community service club" is not related "unless a school could show [it] . . . fell within [the Court's] description of groups that directly relate to the curriculum."<sup>62</sup> In the absence of such a showing, the existence of these and similar groups would signify the creation of a limited open forum within the Act's meaning, "prohibit[ing] the school from denying equal access."<sup>63</sup> The Court went on to hold that the school's "Subsurfers" scuba club, chess club, and "Peer Advocates" service program were "noncurriculum related" and invoked the school's obligations under the Act.<sup>64</sup>

### C. Continued Evasion

Before the Supreme Court decided *Mergens*, the greatest danger faced by equal access claimants was the possibility that school officials could circumvent the EAA by "definitional fiat."<sup>65</sup> A careful reading of Justice O'Connor's opinion makes clear that the possibility of evasion remains as long as the Act makes reference to the curriculum, a facet of the educational system over which school officials exercise considerable control.<sup>66</sup>

In his dissenting opinion,<sup>67</sup> Justice Stevens reveals that the majority's test allows the same manipulation evident before *Mergens* reached the Court. He poses the following hypothetical: if the school in *Mergens* includes "one day of scuba instruction in its swimming classes," then it could arguably pass the

61. *Id.*

62. *Id.*

63. *Id.* at 2366-67.

64. *Id.* at 2369-70. These obligations included "official recognition" of the Christian students' club, which "carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." *Id.* at 2370.

65. *Id.* at 2386 (Stevens, J., dissenting). See *supra* notes 35-44 and accompanying text.

66. The majority in *Mergens* cannot be faulted here. The Court's test, after all, does make "common-sense," 110 S. Ct. at 2366, and it is difficult to imagine a more plausible interpretation of "noncurriculum related." The difficulty lies not with the Court's interpretation, but primarily with Congress' decision to make curriculum-relatedness relevant in the first place. See *infra* notes 74-86 and accompanying text.

67. Although Justice Stevens correctly detects weaknesses in the majority opinion, he misreads the EAA. Justice Stevens maintains that an extracurricular group is "noncurriculum related" only "if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views." *Mergens*, 110 S. Ct. at 2385. For support, he relies mainly on the proposition that "noncurriculum" more sensibly describes subjects that could never "properly be included in a public school curriculum" (i.e. partisan subjects) than subjects that are "not a part of the current curriculum." *Id.* at 2393. Justice Stevens' reasoning does violence to the plain language of the Act and ignores much of its legislative history, see *infra* notes 74-86 and accompanying text, including congressional concern about religious discrimination in fora that did not contain other partisan groups. See, e.g., *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3, 5-6 (1983) (discussing perceived discrimination in *Brandon, Lubbock*).

majority's test of curriculum-relatedness, for the subject matter of the "Subsurfers" would then be taught in a "regularly offered course."<sup>68</sup> One can easily imagine other evasive tactics: a school need only award extra credit for participation in a student organization to transform it into a curriculum-related group.<sup>69</sup> Alternatively, it could announce plans to teach the subject matter of a voluntary organization in the near future, or require participation in a previously voluntary organization in conjunction with a formal course.<sup>70</sup>

Justice Stevens also claims that the majority's test will almost always produce "hard cases" in its application. At most schools with varsity football programs, for example, touch football is also taught in physical education programs. Arguably, "[t]ackle football . . . stands in the same relation to touch football as scuba diving does to swimming."<sup>71</sup> A court with a similar understanding of this relationship may therefore hold that a varsity football program is not curriculum-related and perhaps mandate equal access in schools Congress did not intend to reach.

Justice O'Connor recognizes that opportunities for manipulating the Act still exist. For her, however, the answer is simple: "To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act. On matters of statutory interpretation, '[o]ur task is to apply the text, not to improve on it.'"<sup>72</sup> To the extent that Justice O'Connor is correct in her assertion, only one answer remains for those who wish to foster equal access by way of the EAA: Congress must improve upon the text.

#### IV. A PROPOSED AMENDMENT TO THE EQUAL ACCESS ACT

The weaknesses of the curriculum-relatedness test, combined with the absence of congressional guidance as to its meaning, militate strongly in favor of a change in the Act's test. Before considering possible alternatives, however, one must examine the legislative history to ensure that any changes will indeed further the "broad legislative purpose" of remedying religious discrimination.<sup>73</sup>

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68. *Mergens*, 110 S. Ct. at 2387 (Stevens, J., dissenting).

69. In concluding that the Peer Advocates service program—discussed *supra* in text accompanying note 64—is not curriculum-related, the majority notes that no extra credit is awarded for participation. *Mergens*, 110 S. Ct. at 2369.

70. *Cf. supra* text accompanying note 60 ("In our view, a student group directly relates to a school's curriculum if the subject matter . . . will soon be taught . . . [or] if participation in the group is required for a particular course . . ."). These hypothetical illustrations do not exhaust the supply of possible tactics, for "as long as you have lawyers, they can find ways of doing things one way or another." 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

71. *Mergens*, 110 S. Ct. at 2388 (Stevens, J., dissenting).

72. *Id.* at 2367 (quoting *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456, 460 (1989)).

73. *See supra* notes 57-59 and accompanying text.

### A. The Purpose Informing the EAA

As we have seen, excessive reliance on the legislative history in parsing the Act's language is misplaced.<sup>74</sup> The EAA's history nevertheless reveals that Congress expected the Act to reach a broad array of schools in its protection of religious speech.<sup>75</sup> Members of Congress felt equal access would or should be triggered by many different groups, including clubs devoted to stamp collection,<sup>76</sup> chess,<sup>77</sup> photography,<sup>78</sup> recreation,<sup>79</sup> language,<sup>80</sup> language arts,<sup>81</sup> philosophy,<sup>82</sup> politics,<sup>83</sup> and service.<sup>84</sup>

At first blush, these activities seem to share one feature: they are often initiated, organized, or managed by students themselves. The floor debates and committee hearings reveal that members of Congress indeed compared religious groups to voluntary or student-initiated groups in urging equal treatment of both.<sup>85</sup> Thus it appears that the term "noncurriculum related student groups"

74. See *supra* notes 54-56 and accompanying text.

75. "Congress may sometimes . . . have a clear intent with respect to the whole of a statute even when it muddles the definition of a particular part . . ." *Mergens*, 110 S. Ct. at 2388 (Stevens, J., dissenting).

76. See, e.g., 130 CONG. REC. S8361 (daily ed. June 27, 1984) (statement of Sen. Jepsen); *id.* at S8362 (Sen. Mitchell).

77. See, e.g., *House Hearings I*, *supra* note 30, at 4 (statement of Rep. Lott); 130 CONG. REC. H7734 (daily ed. July 25, 1984) (Rep. Smith); 130 CONG. REC. S8335 (daily ed. June 27, 1984) (Sen. Denton); *id.* at S8359 (Sen. Biden); 130 CONG. REC. H3870 (daily ed. May 15, 1984) (Rep. Lloyd).

78. See, e.g., 130 CONG. REC. H7730 (daily ed. July 25, 1984) (statement of Rep. Clinger); 130 CONG. REC. S8337 (daily ed. June 27, 1984) (Sen. Hatfield); *id.* at S8365 (Sen. Baucus).

79. See, e.g., 130 CONG. REC. S8359 (daily ed. June 27, 1984) (statement of Sen. Biden) ("sports club"); *id.* at S8367 (Sen. Evans) (ski club).

80. See, e.g., *id.* at S8365 (statement of Sen. Baucus) (French); 130 CONG. REC. H3866 (daily ed. May 15, 1984) (Rep. Hall) (same); *id.* at H3859 (Rep. Simon) (Spanish).

81. See, e.g., 130 CONG. REC. S8360 (daily ed. June 27, 1984) (statement of Sen. Mattingly) (drama); *id.* at S8364 (Sen. Thurmond) (same); *id.* at S8367 (Sen. Evans) (debate); 130 CONG. REC. H3866 (daily ed. May 15, 1984) (Rep. Hall) (poetry).

82. See, e.g., 130 CONG. REC. S8335 (daily ed. June 27, 1984) (statement of Sen. Denton); *id.* at S8364 (Sen. Thurmond); *id.* at S8354 (Sen. Levin) ("ethics club").

83. See, e.g., 130 CONG. REC. H7726 (daily ed. July 25, 1984) (statement of Rep. Roukema) (Young Democrats and Republicans); *id.* at H7737 (Rep. Packard) (political clubs); 130 CONG. REC. S8364 (daily ed. June 27, 1984) (Sen. Mitchell) (same); *id.* at S8361 (Sen. Jepsen) (groups discussing Communism).

84. See, e.g., 130 CONG. REC. H7735 (daily ed. July 25, 1984) (statement of Rep. Bonker) (Key Club, Hi-Y); 130 CONG. REC. S8359 (daily ed. June 27, 1984) (Sen. Nickles) (Key Club).

The assumption that a wide assortment of groups would trigger equal access was shared by virtually every member of Congress who participated in debate. Even opponents of the EAA understood the Act to extend to many types of activities. See, e.g., *id.* at S8367 (Sen. Evans); 130 CONG. REC. H3859 (daily ed. May 15, 1984) (Rep. Simon).

85. Many expressed their understanding that equal access would be triggered by other student-initiated groups. See, e.g., *House Hearings II*, *supra* note 31, at 15 (statement of Rep. Bonker); 130 CONG. REC. H12273 (daily ed. October 11, 1984) (Rep. Goodling); 130 CONG. REC. H7735 (daily ed. July 25, 1984) (Rep. Rogers); *id.* at H7738 (Rep. Darden); 130 CONG. REC. S8342 (daily ed. June 27, 1984) (Sen. Hatfield) ("The triggering mechanism is that the students in that school initiate a request."); *id.* at S8355 (Sen. Levin); *id.* at S8357 (Sen. Durenberger); 130 CONG. REC. H3868 (daily ed. May 15, 1984) (Rep. Goodling). Others spoke generally in terms of other "voluntary" groups. See, e.g., 130 CONG. REC. H7739 (daily ed. July 25, 1984) (Rep. Hall); *id.* at H7740 (Rep. Frenzel); see also *House Hearings II*, *supra* note 31, at 52 (testimony of Harvard Law School Professor Laurence Tribe) (emphasizing whether school has allowed "groups whose formation is not initiated or substantively directed, or endorsed by school authorities"); HOUSE REPORT, *supra* note 7, at 12 (additional views of Rep. Boucher) ("if you allow the stamp club or the gymnastics club



is little more than a synonym for groups controlled largely by students.<sup>86</sup>

### B. *Amending the EAA*

A test that reflects this understanding of the EAA's triggering mechanism would conform implementation more closely to the expectations of Congress and offer discernible advantages to the present curriculum-relatedness test. The following proposed amendment to 20 U.S.C. § 4071(b)<sup>87</sup> of the EAA embodies such a test:

(b) A public secondary school creates a limited open forum whenever such school grants an opportunity for one or more student-initiated or student-directed groups to meet on school premises during noninstructional time.

In addition to honoring the spirit of the EAA, the proposed amendment would offer several advantages, namely greater (1) objectivity and ease in producing evidence at trial, (2) sensitivity to local concerns, and (3) conformity to recent establishment clause jurisprudence.

#### 1. *Objectivity and Evidentiary Feasibility*

Under the proposed test, reference to a school's curriculum would no longer be necessary, eliminating the potential for the definitional maneuvering evident in *Garnett* and *Mergens*. The proposed test has the advantage of presenting judges a more judicially administrable standard. Questions in trials and hearings would turn upon much simpler facts, such as whether existing groups are actually student-initiated or -directed.<sup>88</sup> Gone are the "hard cases" which

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or some other student organization to meet on school grounds, you should also allow the student Bible club or the religious club to have similar privileges"); 130 CONG. REC. H7724 (daily ed. July 25, 1984) (Rep. Frank) ("If any group is allowed to meet, then all groups, as long as they do not break either the laws or the furniture, should be allowed to meet . . ."); *id.* at H7732 (Rep. Goodling) (group is curriculum-related if school "require[s] or directly encourage[s] student participation"); *cf. Mergens*, 110 S. Ct. at 2378 (Marshall, J., concurring) ("[T]he Act as construed by the majority simply codifies in statute what is already constitutionally mandated: schools may not discriminate among student-initiated groups that seek access to school facilities for expressive purposes . . .").

86. This seems especially true in light of the absence in the legislative history of any special reasons for utilizing a curriculum-relatedness test. *See supra* note 56.

87. *See supra* note 23.

88. Professor Laycock correctly cautions against reading "noncurriculum related" as "student-initiated" because student initiation alone cannot be the standard. Laycock, *supra* note 11, at 39-40. Because "[a] school with many faculty-initiated student groups can largely preempt demand for student-initiated groups[,] a mere student-initiation standard would be dramatically underinclusive. *Id.* Also, schools could take advantage of such a standard by requiring that faculty members launch all student organizations even if the students themselves subsequently operate them.

Professor Laycock's proposed reading, however, does not remedy the deficiencies of the statutory language. For Laycock, "curriculum-related groups are those that are an extension of the classroom. . . . If a group is sponsored by a teacher who teaches a closely related course, and if nearly all the members of the group take that course, then the group is curriculum related . . . ." *Id.* at 40-41. First, this reading

concern Justice Stevens. There would be no need, for example, to determine whether varsity football is sufficiently similar to touch football within a physical education class to warrant a finding of curriculum-relatedness.<sup>89</sup>

Of course, school officials could also attempt to "manipulate" the proposed amendment by eliminating all student-initiated or -directed groups. It is important to note, however, that such attempts would not constitute a failure to comply with the Act. Congress endorsed the right of a school to remove itself from the EAA's reach: a school need only refrain from offering a "limited open forum" in order to *lawfully* deny equal access.<sup>90</sup> The current test fails because it allows schools understood by Congress to have offered such a forum to claim otherwise. A school could "evade" the proposed amendment by denying access to student-initiated or -directed groups, but it would then have properly removed itself from the scope of the Act.<sup>91</sup>

## 2. Federalism Concerns

Equally important is the fact that the proposed amendment treads more carefully than the current version in a sensitive area of federalism—the nation's system of education. Authority over matters of education has long been vested in local and state governments.<sup>92</sup> The Supreme Court has shown considerable respect for this traditional political arrangement.<sup>93</sup>

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fails to prevent courts from deferring to a school's determination of what constitutes a "closely related course." Second, as Laycock himself recognizes, continued reference to the curriculum presents "problematic cases" yielding counterintuitive results. *Id.* at 41-42. For instance, because the "relationship between athletic teams and the physical education curriculum is tenuous at best," athletic teams might trigger the EAA under his reading. *Id.* at 41. Also, "[t]he debate team, the drama club, the band, and the chorus may or may not be linked to a class in speech, theater, or music." *Id.* These activities, which often (though not always) bear the imprimatur of the school, may thus be deemed "noncurriculum related" even if under strict faculty control. Each of these problematic cases is resolved by inquiring whether the group in question is substantively controlled by students, for it is only when activities such as school plays and concerts are conducted by faculty that they are "plausibly viewed as official expression of the school rather than private expression of students." *Id.* (footnote omitted). Thus the proper test is whether other students are allowed to initiate *or direct* groups; it is precisely under these circumstances that exclusion of voluntary religious speech is most likely to convey a message of disapproval. *See infra* notes 95-102 and accompanying text. Of course, occasional assistance or nonparticipatory supervision by faculty would not convert student-directed activity into official expression.

89. In fact, the proposed standard reflects the only intelligible difference between a scuba club and a varsity football program from the perspective of equal access: a scuba club may be organized and run solely by students, whereas a football team cannot.

90. *See, e.g., supra* text accompanying note 72; 130 CONG. REC. S8357 (daily ed. June 27, 1984) (statement of Sen. Durenberger) ("The school board determines whether it will create a limited open forum by allowing student-initiated groups to meet on school premises.").

91. To understand why Congress may have considered it wise to offer schools this choice, *see supra* note 49.

92. *See* Current Topic, *Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act*, 3 YALE L. & POL'Y REV. 187, 205-06 (1984).

93. "The Court has long recognized that local school boards have broad discretion in the management of school affairs . . . '[P]ublic education in our Nation is committed to the control of state and local authorities.'" Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 863-64 (1982) (plurality opinion) (citations omitted) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The new test recognizes the traditional role school officials play in curricular affairs. By eliminating the determination of curriculum-relatedness, the amendment would minimize the tensions that would inevitably arise should courts attempt to define curriculum-relatedness on a case-by-case basis.<sup>94</sup>

### 3. *Equal Access and the Perception of Endorsement*

The proposed amendment has the added advantage of conforming the Act to recent judicial interpretation of the establishment clause. Most recently, the Court has "paid particularly close attention to whether [a] challenged governmental practice either has the purpose or effect of 'endorsing' religion."<sup>95</sup> In focusing on the message sent by official practices, the Court has stated that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"<sup>96</sup>

Where a school has previously allowed voluntary groups, recognition of a religiously oriented group is unlikely to convey a message of state sponsorship. Misperception of government endorsement of religion is minimized in a setting where other students are allowed to congregate voluntarily around common interests.<sup>97</sup> As with their secular counterparts, the students involved in a truly voluntary religious group bear responsibility for its existence and even the suggestion that the school itself has promoted the group should be negated.<sup>98</sup>

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Affording school officials complete and unfettered discretion, however, is antithetical to the recognized First Amendment rights of high school students. If school officials retain absolute authority to control every activity on the high school campus, students could be forced to refrain from orderly political protest or to salute the American flag. Well-known and established Supreme Court precedent tells us otherwise. *See, e.g., Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding right of Jehovah's Witness student to refrain from saluting flag).

94. *Cf. Mergens*, 110 S. Ct. at 2367 (curriculum-relatedness is subject to trial court's factual findings regarding curriculum).

95. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3100 (1989). The endorsement approach was first suggested by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 578, 687 (1984). The Court has utilized the endorsement approach in various contexts. *See, e.g., Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488-89 (1986) (student's use of "neutrally available state aid" to finance religious education did not "confer any message of state endorsement of religion") (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985) (establishment clause violated when "message of government endorsement or disapproval of religion" is conveyed) (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). *But see Mergens*, 110 S. Ct. at 2377-78 (Kennedy, J., concurring) (because endorsement test "has insufficient content to be dispositive," true test is whether government directly benefits or coerces religious belief).

96. *Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

97. *See Mergens*, 110 S. Ct. at 2372 (plurality opinion) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 1176 (2d ed. 1988) ("a message of official endorsement . . . is counteracted where a number of different groups, religious and nonreligious, are equally free to use the facilities and in fact do so").

98. *Cf. Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect."); McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 57 (1989) (government does not subsidize religion

Conversely, where a school prohibits religious speech, yet allows other voluntary expression, the message most likely to be sent is that spiritual matters are dangerous, detrimental, or, at best, trivial.<sup>99</sup> Unyielding commitment to equality demands the recognition that these messages are equally repugnant to the Constitution.<sup>100</sup>

### CONCLUSION

Allowing voluntary, student-initiated religious speech alongside voluntary secular speech is most consistent with the central establishment clause principle of neutrality,<sup>101</sup> which precludes both government endorsement of and hostility toward religion. Those concerned about the appearance of official endorsement must realize that the exclusion of such speech is just as likely to convey a message of hostility. In these situations, the balance is best struck when government allows expression and resolves any potential misperception by explaining its position of neutrality. After all, in a highly pluralistic society, one of the most important principles we can teach our students is that "government does not endorse everything it fails to censor . . . ."<sup>102</sup>

Although Congress expressed similar beliefs, its pen was faulty. Enforcing the constitutional standard of neutrality requires clear language, for even well-meaning judges and officials can act in concert to perpetuate the dangerous notion that religious matters must be confined or relegated to the periphery of society. If Congress fails to amend the EAA, *Mergens* may prove a Pyrrhic victory, for the Supreme Court's determination that the EAA is constitutional means little if the Act can be avoided at will.

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by allowing "student initiated activities" within "broad spectrum of groups"). The proposed amendment will not preclude schools from ensuring that students do not perceive endorsement by affirmatively disclaiming sponsorship of religious groups. *Cf. Mergens*, 110 S. Ct. at 2378 (Marshall, J., concurring) (establishment clause requires schools to actively disassociate themselves from religious speech).

99. If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not "neutral." Studious silence on a subject that parents may say touches all of life is an eloquent refutation.

McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 162 (1986).

100. *Ball*, 473 U.S. at 389 ("message of government endorsement or disapproval of religion" violates establishment clause) (emphasis added).

101. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (discussing "established principle that the government must pursue a course of complete neutrality toward religion"); McConnell & Posner, *supra* note 98, at 34 (religion clauses "best interpreted from the standpoint of neutrality"); Paulsen, *supra* note 4, at 325-26 ("a Madisonian 'neutrality' more closely comports with the language, structure, and, crucially, the internal coherence" of religion clauses).

102. Laycock, *supra* note 11, at 15; *see also* A. ADAMS & C. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 81 (1990) ("equal access teaches students the valuable civic lesson of toleration for the beliefs and practices of others"). Otherwise, "if schools continue to teach students that religious speech is taboo, our country will reap a harvest of religious intolerance." SENATE REPORT, *supra* note 7, at 12.